

ST 04-2

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	Docket No.	02-ST-0000
OF THE STATE OF ILLINOIS)	IBT No.	0000-0000
v.)	NPL No.	0000
JOHN DOE , as responsible officer of)		
ABC Processing Corp.,)	John E. White,	
Taxpayer.)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Lee DeWald, appeared for John Doe; George Foster, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when John Doe (“taxpayer” or “Doe”) protested a Notice of Penalty Liability the Illinois Department of Revenue (“Department”) issued to him as a responsible officer of ABC Processing Corp. (“ABC”). Notice of Penalty Liability (“NPL”) number 7746 assessed a penalty equal to ABC’s unpaid Retailers’ Occupation Tax (“ROT”) and Use Tax (“UT”) liabilities regarding the months of January 1995 through March 31, 2001, but not inclusive. The penalty was a personal liability penalty, issued pursuant to § 3-7 of Illinois’ Uniform Penalty and Interest Act (“UPIA”).

Doe and another former ABC employee testified on Doe’s behalf, and he offered books and records into evidence. I have reviewed that evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the penalty be assessed as issued.

Findings of Fact:

1. ABC was an Illinois corporation that produced and sold commemorative sports

- memorabilia and synthetic lumber, and refined photographic waste. Hearing Transcript (“Tr.”), pp. 17-18 (Doe); Department Group Ex. 1, p. 8.
2. Doe was president of, and an 80% shareholder in, ABC. Tr. p. 17 (Doe).
 3. Joe Blow (“Blow”) was employed as ABC’s accountant from 1983 to 1999. Tr. pp. 10 (Blow), 19 (Doe).
 4. Under Doe’s authority and direction, Blow signed most of the checks issued by ABC between 1995 and 1999. Tr. pp. 10-11 (Blow), 20 (Doe).
 5. An outside accountant prepared ABC’s sales tax and other corporate returns for ABC during 1995 and 1998. Tr. p. 20 (Doe). Doe could not recall who signed ABC’s sales tax and other tax returns during that period. Tr. p. 21 (Doe).
 6. Until Blow left ABC’s employ, both Doe and Blow were signatories for ABC’s checking account. Tr. pp. 10 (Blow), 20, 44-45 (Doe).
 7. On June 11, 1997, ABC entered into a Working Capital Management Account and Term Loan and Security Agreement (hereinafter “WCMA agreement”) with Merrill Lynch Business Financial Services, Inc. (“MLBFS”) Taxpayer Ex. 1 (copy of agreement).
 8. After ABC began experiencing cash flow problems in 1998, ABC and MLBFS entered into two subsequent agreements, titled, respectively, Forbearance Agreement and Forbearance Agreement No. 2, and dated, respectively, June 21, 1999 and July 1, 1999. Taxpayer Exs. 2-3 (copies of agreements).
 9. Pursuant to the forbearance agreements, MLBFS agreed, *inter alia*, to not immediately take its default remedies (permitted by the WCMA agreement) against ABC, and further allowed ABC to borrow funds over and above the amounts authorized in the WCMA agreement. In exchange, ABC agreed, *inter*

- alia*, to write checks drawn on its MLBFS account only for items approved by MLBFS pursuant to a budget to which it and ABC agreed. Taxpayer Exs. 2-3.
10. ABC's monthly sales and use tax liabilities were not items included in the budgets agreed to by ABC and MLBFS, pursuant to the forbearance agreements. Taxpayer Ex. 2, pp. 8-9; Taxpayer Ex. 5, pp. 2-4.
 11. The first expense listed on the budgets agreed to by Doe, on ABC's behalf, and MLBFS, was an amount for officer salaries. Taxpayer Ex. 2, p. 8; Taxpayer Ex. 5, p. 2.
 12. The Department conducted an audit of ABC for the period from January 1, 1995 through and including September 30, 1998. Department Group Ex. 1. That audit was completed in October 1999. *See* Department Group Ex. 1, pp. 7-12.
 13. At the end of the audit, the auditor prepared a report showing that ABC owed \$52,059.00 in ROT, \$13,557.00 in UT, as well as penalties and interest. Department Group Ex. 1, p. 7.
 14. The audit conducted was triggered by a prior audit of ABC's business for the period of January 1991 through December 1994. Department Group Ex. 1, p. 8. That audit established a tax liability that Doe knew had been finalized in the Department's favor. *Id.*; Tr. pp. 24-27 (Doe).
 15. During the January 1995 through September 1998 audit period, Doe and Blow signed ABC checks drawn to the order of the Department to pay the finalized and previously determined audit liability. Taxpayer Exs. 8-12 (copies of, *inter alia*, check receipts indicating checks drawn to the order of the Department); Tr. pp. 24-26, 57-59 (Doe).
 16. The auditor who conducted the audit of ABC's business for the subsequent period

- of January 1995 through September 1998 prepared work papers that detailed the different types of transactions that ABC undertook during the audit period that resulted in assessments of either ROT or UT. Taxpayer Ex. 6 (auditor's work papers).
17. Of the \$52,059.00 in ROT assessed against ABC, \$32,329.00 of it was for tax monies that ABC reported due regarding the second and third quarters of 1998, but did not turn over to the Department. Taxpayer Ex. 6, p. 1. The remaining \$19,730.00 in ROT assessed was for sales taxes based on gross receipts regarding which ABC had not self-assessed ROT. *Id.* ABC was also assessed UT in the amount of \$13,557, based on its purchase of goods that it used or consumed in Illinois. *Id.*
18. On 10/15/99, Doe signed that audit report, on ABC's behalf, under a statement that provided, in pertinent part:
- Under penalties of perjury, I state that I have examined this report and, to the best of my knowledge, it is true, correct, and complete. The information in this report is taken from the records of the business for which it is filed. ... A signed Form EDA-105 constitutes a notice and demand for purposes of the Uniform Penalty and Interest Act. Therefore, if I do not pay the amount shown on this report within 30 days of the signature date on this report, additional interest will accrue for the signature date. Also, if I do not pay the amount shown within 30 days of the signature date, a late-penalty penalty (15 percent for tax due between January 1, 1994, and December 31, 1997; 20 percent for tax due on or after January 1, 1998) will be assessed.
- Department Group Ex. 1, p. 7.
19. ABC was required to file quarterly sales and use tax returns during the 1/95 through 9/98 audit period. Department Group Ex. 1, p. 9 (p. 2 of the auditor's narrative report). ABC filed all of those quarterly returns late. *Id.*

20. In addition to the audit liability, the Department issued separate tax assessments against ABC for the months of October 1998 through December 1998, for December 1999, for the first quarter of 2000, and for the months of April and December of 2000. It also assessed penalties to ABC regarding its tax assessments for the months of 10/98 through 12/98, 12/99 and for the first quarter of 2000. Department Group Ex. 1, pp. 2-4.

Conclusions of Law:

When the Department introduced the NPL into evidence under the certificate of the Director, it presented prima facie proof that Doe was personally responsible for ABC's unpaid tax liabilities. 35 ILCS 735/3-7; Branson v. Department of Revenue, 68 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) ("by operation of the statute, proof of the correctness of such penalty, including the willfulness element, is established by the Department's penalty assessment and certified record relating thereto."). The Department's prima facie case is a rebuttable presumption. Branson, 168 Ill. 2d at 262, 659 N.E.2d at 968. After the Department introduces its prima facie case, the burden shifts to the taxpayer to establish that one or more of the elements of the penalty are lacking. *Id.*

Section 3-7 of the UPIA provides that a personal liability penalty liability may be imposed upon:

- [1] Any officer or employee of any corporation ... who has the control, supervision or responsibility of filing returns and making payment of ... the tax[es] ... imposed ... **and** who willfully:
- [2] fails to file such return **or**
- [3] [fails] to make such payments to the Department **or**
- [4] ... attempts ... in any other manner to evade or defeat the tax

35 ILCS 735/3-7 (emphasis and brackets added).

Doe concedes being a responsible officer of ABC, but argues that he did not willfully fail to pay any of the tax at issue. Doe asserts that since the largest part of the NPL here is attributable to an ROT assessment for which no corresponding amount was collected by ABC when making sales to its customers, that assessment is not a trust tax for which a § 3-7 penalty may be imposed against him. Tr. pp. 71-72 (closing argument). He also contends that he did not act willfully because, by the time the greatest amount of ABC's unpaid corporate liability was established, he no longer had the authority to approve which of ABC's liabilities would be paid. Tr. pp. 70-71, 73. Finally, he argues that he cannot willfully have failed to pay ABC's tax liabilities because, throughout the audit period, he was making tax payments to the Department. Tr. pp. 72-73 (argument). I discuss each argument in turn.

Counsel cited three cases to support his separate arguments that Doe was not willful. Tr. pp. 71, 73 (referring to Branson v. Department of Revenue, 68 Ill. 2d 247, 258, 659 N.E.2d 961, 966-67 (1995), McLean v. Department of Revenue, 326 Ill. App. 3d 667, 761 N.E.2d 226 (1st Dist. 2001) and Estate of Young v. Department of Revenue, 316 Ill. App. 3d 366, 734 N.E.2d 945 (1st Dist. 2000)). None of them, however, address whether an ROT assessment issued to a corporation that did not collect a corresponding amount of tax from its purchasers is a trust tax under the UPIA. On the other hand, Brown v. Zehnder, 295 Ill. App. 3d 1031, 693 N.E.2d 1255 (1st Dist. 1998) does address whether ROT is a trust tax, and the court in that case held that it is.

Brown involved a protest action initiated by Robert Brown, who sought the return of tax he paid after the Department issued an NPL to him as a responsible officer of Suzy's Sweets, Inc. Brown, 295 Ill. App. 3d at 1032, 693 N.E.2d at 1257. The NPL was issued to Brown to recover Suzy's unpaid retailers' occupation and use taxes for the

months of August, and October through December, of 1994. *Id.* In a motion for summary judgment, Brown argued that, as a matter of law, he could not be held liable for the corporation's failure to pay its ROT liability, because the tax imposed by the ROTA is not a "trust tax" as defined by section 3-7(f). Since § 3-7(a) applies only to trust taxes, Brown argued, he could not be held personally liable under that provision. *Id.* at 1032-33, 693 N.E.2d at 1258.

The Brown court began its analysis by reviewing the complementary provisions of the ROTA and the UTA, and of the legislature's passage of the UPIA. It noted that the UPIA is the act pursuant to which the Illinois General Assembly intended to collect and make more uniform all of the different penalty and interest provisions of the various tax acts administered by the Department. Brown, 295 Ill. App. 3d at 1035-36, 693 N.E.2d at 1259 (*citing* 35 ILCS 735/3-1A). The court reasoned that it would not make sense to read § 3-7 of the UPIA as a repeal of the legislature's prior and longstanding grant of express authority to the Department to impose and collect a penalty from a responsible person, pursuant to former § 13½ of the ROTA, for a corporate retailer's nonpayment of ROT. *See Brown*, 295 Ill. App. 3d at 1036, 693 N.E.2d at 1259. Rather, it held that, "section 3-7 ... was not intended to prevent the Department from imposing a penalty for a ROTA violation." *Id.* The court wholly rejected Brown's argument that § 3-7 of the UPIA did not apply to a corporation's unpaid ROT liabilities, and held that "[a taxpayer] c[an] be personally liable for the nonpayment of ... taxes, whether they are considered taxes paid pursuant to UTA or ROTA." *Id.* at 1035, 693 N.E.2d at 1259.

And while the corporate retailer in Brown collected tax from its customers, and then did not turn such monies over to the Department, there is no reason for any different result in this case, for the amounts of tax ABC did not collect from its customers. The

ROTA imposes a tax on retailers, not on their sales. 35 ILCS 120/2; National Bank of Hyde Park in Chicago v. Isaacs, 27 Ill. 2d 205, 188 N.E.2d 704 (1963). Tax is due under the ROTA regardless whether the retailer heeds its statutory obligation under the UTA to collect use tax from its customers or not. National Bank of Hyde Park in Chicago v. Isaacs, 27 Ill. 2d 205, 188 N.E.2d 704 (1963).

The Brown court held that the definition of trust tax in the UPIA was different than the definition of a trust tax as that term is used in bankruptcy proceedings. Brown, 295 Ill. App. 3d at 1037, 693 N.E.2d at 1260 (“The fact that a ROTA tax [i]s not a ‘trust fund tax’ under the [Bankruptcy] Code is irrelevant to the question of whether it is a ‘trust tax’ as defined by the language of the [UPIA].”). The UPIA’s definition of trust tax does not require that tax, in fact, be received by someone from another and held for later remission to the State. 35 ILCS 735/3-7(f). Rather, a tax is a trust tax regardless whether the tax is actually received; what counts is whether the person was required to turn over such funds to another for later remission to the State. *Id.*; 35 ILCS 105/8.¹ ABC was required to be the recipient of its customers’ UT liabilities, and the tax required to be collected by ABC constitutes a debt ABC owed to the State. 35 ILCS 105/8.

Were Doe’s argument accepted, corporate retailers could undercut other Illinois retailers by selling goods tax free, dissolve after being audited, and its responsible officers and/or employees, thereafter, avoid all derivative liability — all because, when

¹ Thus, ABC’s own UT liability is also a trust tax as that term is defined in the UPIA. Under the UPIA, the trust is deemed to have been created not only where a purchaser actually turns over to the retailer the monies intended to be collected by it from the purchaser. Brown, 295 Ill. App. 3d at 1037, 693 N.E.2d at 1260. It is also created where the retailer refuses to do so (35 ILCS 105/8), or where the purchaser chooses to make a purchase without paying tax directly to its vendor — that is, where it defers its tax obligation until such time as it determines whether its use of the property is, in fact, subject to UT — and, thereafter, fails to self-assess UT once it exercises the privilege on which tax is imposed. 35 ILCS 105/2; 35 ILCS 735/3-7(f); Brown, 295 Ill. App. 3d at 1037, 693 N.E.2d at 1260.

acting upon the corporation's behalf, those responsible persons refused to heed Illinois' tax laws. I agree with the Brown court that that could not have been the legislature's intent when it included the definition of trust tax within § 3-7 of the UPIA. Doe's argument furthers no coherent tax policy, it is contrary to the holding in Brown, and it ignores the Illinois General Assembly's decision to make the use tax that a retailer should have collected from its customers, but did not, a debt the retailer owes to the State. 35 ILCS 105/8. Thus, I reject Doe's argument that an ROT assessment issued to a retailer that has not charged a corresponding amount of tax to customers regarding the particular gross receipts at issue is not a trust tax under UPIA § 3-7.

Doe's next argument is that he should not be deemed to have acted willfully since, by the time the Department completed its audit of ABC, he no longer had the ability to make decisions regarding the payment of ABC's taxes. His argument is not that, on and after October 15, 1999, he was no longer a responsible officer of ABC. There is no doubt that he was. *See* Tr. p. 5 (statement of counsel). Rather, his arguments here have two fundamental premises. The first Doe articulates, and that is that the agreements he made with MLBFS stripped him of any ability to make decisions regarding which checks ABC could write to pay its corporate liabilities. Tr. pp. 72-73. I will discuss that soon, but I first want to address the premise to which Doe only alludes.

By asking that I focus on what occurred on October 15, 1999 and thereafter (Tr. pp. 70-71, 73), that is, after the Department auditor presented Doe with the results of his audit of ABC's business for 1/95 to 9/98, what Doe wants to suggest is that that was the first time he had any knowledge that ABC's sales of its self-produced commemorative coins and/or medallions were subject to ROT. *See* Tr. pp. 24-25 (Doe); Department Group Ex. 1. That suggestion, however, is dashed by Doe's hearing testimony that ABC

was previously assessed tax, for an earlier audit period, regarding the same type of transactions as those for which ABC was assessed tax for the applicable period. Tr. pp. 25-27 (Doe). An individual's knowledge is a factor within a willfulness analysis. *E.g.*, Department of Revenue v. Marion Sopko, Inc., 84 Ill. App. 3d 953, 406 N.E.2d 188 (1st Dist. 1980). Here, Doe knew that ABC had fought the Department's prior audit determination and lost. Tr. p. 26. He knew that he had arranged to pay tax, based on that former contested case, and involving the same issue, during the audit period during which most of the tax was assessed against ABC here. Tr. pp. 25-27, 57 (Doe). Since the Department had previously assessed tax on the same type of transactions, Doe must have known that the gross receipts ABC realized from selling similar items were also subject to tax. Tr. p. 25 (Doe). Yet Doe, as this dispute obviously proves, continued to have ABC file returns on which it did not self-assess ROT on the same type of transactions.

In other words, Doe's argument that I focus only on the actions or decisions he may or may not have been able to effect on or after October 1999 is a deft attempt to disguise the real period at issue here. The question is not whether Doe acted willfully when, after October 15, 1999, he failed to pay the tax the Department determined was due on ABC's prior sales. Rather, the inquiry is whether Doe acted willfully when, during the 1/95 to 9/98 audit period, Doe failed to pay tax that should have been reported due on each quarterly return ABC filed for the 1/95 through 9/98 audit period. During that period, Doe clearly knew that ABC's sales of the coins and medallions that it produced were subject to ROT. He was the president of ABC, and he had actual knowledge that the Department had already assessed tax against ABC regarding its sales of the very same type of goods. Tr. p. 25 (Doe).

Even more importantly, years before the original audit took place, the Illinois

Supreme Court had already interpreted the exemption to which ABC claimed entitlement (now codified at 35 ILCS 120/2-5(18)) as applying only to the “legal tender, currency, [and] medallions” that were either minted or printed by “the State of Illinois, the government of the United States of America, or the government of any foreign country” Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 227, 503 N.E.2d 300, 303 (1986). Yet almost ten years after that decision, Doe continued to have ABC file returns on which it reported that the gross receipts it realized from making and selling, for example, commemorative coins and medals, were not taxable. Taxpayer Ex. 6, pp. 10-11 (list of global taxable exceptions). At hearing, moreover, Doe continued to assert his belief that ABC’s sales of sports memorabilia were not subject to ROT, and that the Department’s assessment of tax on its sales was wrongful and arbitrary. Tr. pp. 25-26 (Doe). For example, he testified that, “I have since found out that we’re the only company in the State of Illinois to ever be charged tax on medallions and coins and to this day, coin shops are not even charging sales tax on medallions.” Tr. p. 25 (Doe).

I find Doe’s testimony on those points either incredible or an outright denial of black-letter Illinois law. If it’s the latter, the State of Illinois and its agencies are powerless to make Doe agree with the Illinois Supreme Court’s interpretation of ROTA § 120/2-5(18) in Springfield Coin. Pursuant to § 3-7 of the UPIA, however, the Department can hold Doe personally liable for acting as though the Court’s interpretation of that statutory provision did not apply to ABC, and for his resulting willful failure to report and pay the true amount of ABC’s taxes. *See Coleman v. C.I.R.*, 791 F.2d 68, 69 (7th Cir. 1986) (“Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. ... The government may not prohibit the holding of these beliefs, but it may penalize people who act on them.”).

The evidence, moreover, shows that the tax assessed against ABC involved sales other than just its sales of sports memorabilia that ABC made in the form of medallions and coins. ABC also failed to self-assess tax regarding its sales of, for example: the plastic lumber it made and sold (Taxpayer Ex. 6, p. 10 (invoice nos. 151047, 151189, 151246, 151457), p. 11 (invoice no. 150894); a coin box (*id.* p. 10 (invoice no. 151237)); autographed cards (*id.* p. 11 (invoice no. 258253); and a miniature enameled baseball bat (*id.* (invoice no. 258619)). Those goods have nothing whatever to do with ABC's sales of coins or medals, yet ABC failed to charge, collect or pay tax as measured by the gross receipts from such sales. *Id.*, pp. 10-11. Doe offered no evidence to explain how he could have possibly believed that those items were not subject to ROT, and his hearing testimony focused solely on the suggestion that the only tax at issue here involved ABC's sales of coins and/or medallions. In light of the facts, I find Doe's disdain for the audit as being unfair or arbitrary to be not grounded in fact.²

And one final note on Doe's implied argument that he did not act willfully because he first learned of ABC's liability in October 1999. The single greatest item of ROT assessed following the audit was the amount of ROT that ABC, itself, reported as being due on the returns it filed regarding the second and third quarters of 1998, but which amounts it failed to remit to the Department. Taxpayer Ex. 6, p. 1. Specifically, of the \$52,059.00 total ROT assessed, \$32,329.00 of it was assessed because ABC did not pay over to the Department the tax that it reported as being due on the returns that it filed, late, regarding those two quarters. *Id.*; Department Group Ex. 1, pp. 9 (ABC's second

² ABC, through Doe, agreed to the correctness of the audit findings. Department Group Ex. 1, p. 7. Thus, Doe cannot collaterally attack, here, the correctness of audit findings that ABC never contested. Department of Revenue v. Dombrowski, 202 Ill. App.3d 1050, 1053-54, 560 N.E.2d 881, 883-84 (1st Dist. 1990). Nor can he contest, here, the findings and conclusions made

quarter 1998 return was filed late and, as of 1/26/99, ABC's third quarter 1998 return had not yet been filed). In other words, most of the audit's ROT assessment has nothing whatever to do with Doe's suggestion that until October 1999, he did not know that ABC's coin or medallion sales were taxable.

ABC's second and third quarter returns were due on, respectively, April 20, 1998 and July 20, 1998. 35 ILCS 120/3. The tax required to be shown due on those returns was also due on the dates the returns were due. *Id.* ABC filed its second quarter return for 1998 late, but sometime before 1/26/99, and it did not pay the tax shown due on that return. Department Group Ex. 1, p. 9. Nor did it timely pay the tax required to be shown due on its third quarter 1998 return, which was also not timely filed. Taxpayer Ex. 6, p. 1. Again, the question is not whether Doe acted willfully when, on or after October 15, 1999, he failed to pay the \$32,059.00 (and more) that should have been paid on or prior to July 20, 1998. Rather, the question is, did Doe act willfully when, on April 20, 1998 and July 20, 1998, he failed to pay the tax that ABC incurred on its sales made during the applicable quarters. Doe concedes that he was the one who decided the order of ABC's debt payments prior to the time ABC entered into the forbearance agreements in June 1999. Tr. p. 20 (Doe). ABC's second and third quarter 1998 tax returns and tax payments were due almost a year before ABC signed the first forbearance agreement, and almost fifteen months before Doe was presented with the auditor's report. Taxpayer Ex. 2; Department Group Ex. 1, p. 7. The evidence, therefore, leads directly to the reasonable conclusion that it was Doe who made the separate and independent decisions not to pay the tax that was due on April 20, 1998 and July 20, 1998. Taxpayer Ex. 6, p. 1. Nothing in this record makes me think Doe's decisions were other than willful.

pursuant to ABC's original administrative hearing regarding a prior audit period, because that

I now address Doe's argument that he could not have acted willfully because he no longer had the ability to make decisions regarding which ABC checks would be honored by the time the audit was completed, in October 1999. Doe bases this argument on the provisions of the forbearance agreements between ABC and MLBFS. The first forbearance agreement provided, *inter alia*, that MLBFS would forbear from implementing the default remedies that were available to it under the WCMA agreement, and would lend additional funds to ABC, in exchange for certain promises of performance from ABC. ABC promised to close its accounts at all other lending or banking institutions and transfer any existing funds to an account at MLBFS, and to limit its expenditures to those set forth in a budget agreed upon by the parties. The same provisions were also part of the second forbearance agreement. Doe signed both forbearance agreements on ABC's behalf. Taxpayer Exs. 2-3.

The critical feature of the forbearance agreements, for purposes of this matter, is that the budgets included no provision for ABC's payment of its Illinois sales and use tax liabilities. Taxpayer Ex. 2, pp. 8-9; Taxpayer Ex. 5, pp. 2-4. Thus, the question is whether Doe's decision to sign an agreement that required ABC, if it wanted to stay in business, to limit its expenditures to those set forth in the budgets prepared by MLBFS, and which did not allow for ABC's payment of its ROT and UT liabilities, inures to Doe's benefit here? That is to say, can Doe use the forbearance agreements with MLBFS as a defense against the Department's claim that he willfully failed to file ABC's returns or pay its taxes? For the following reasons, I conclude that he may not.

Doe entered into the forbearance agreements to keep the business for which he was an 80% owner operating during a time when it was unable to pay its obligations. By

agency decision was never challenged via administrative review. *Id.*

signing the agreements, Doe ensured that ABC would continue to be able to borrow funds or obtain credit from MLBFS, and continue to operate. Doe knew that ABC would continue to operate during the periods for which MLBFS agreed to forbear from exercising its default remedies against ABC. And since Doe was presented with copies of the budgets agreed to by MLBFS and ABC, Doe also knew that that ABC's continued operations meant that it would continue to incur Illinois use and sales tax liabilities, and not pay such liabilities.

When Doe agreed to the forbearance agreements, and thereby, agreed to have ABC continue its operations, and continue to incur Illinois sales and use tax liabilities — liabilities that he knew ABC would not be paying — he acted willfully. That willful action manifested itself each period that ABC remained in business, but failed to file the required Illinois sales and use tax return. *See* Department Group Ex. 1, pp. 2-3 (showing estimated assessments, which are prepared after the Department has determined that a person was in business, but failed to file the required return, for the months of January to March 2001, October to December 2000, and December 1999).

His willful action also manifested itself when he signed the forbearance agreements and agreed that ABC would use corporate funds to pay obligations other than its current and ongoing Illinois sales and use tax liabilities. In fact, the first item of expense that each budget provided for is an amount to be paid for officer's salaries. Taxpayer Ex. 2, p. 8 (\$10,000 authorized), Taxpayer Ex. 5, p. 2 (\$16,000 authorized). Thus, Doe made the conscience decision to pay himself during the months for which ABC would continue to make sales and incur Illinois tax liabilities, but not pay those ongoing liabilities. It is not that Doe preferred ABC's other creditors when MLBFS refused to honor his alleged requests to pay ABC's Illinois tax liabilities. Rather, he

willfully preferred those other creditors when he signed the forbearance agreements, and thereafter, when he wrote checks drawn on ABC's account to pay ABC's other obligations, as provided for in the budgets agreed to by him and MLBFS. *See* Taxpayer Ex. 2, pp. 8-9 (budget), Taxpayer Ex. 5, p. 2 (budget).

Finally, Doe argues that he did not willfully fail to pay ABC's taxes because he was making tax payments throughout the audit period. Doe introduced evidence showing that ABC made payments to the Department during the audit period. Taxpayer Exs. 8-12. But he never asserts that the checks were drawn to pay the liabilities at issue. Indeed, he testified unequivocally that the checks were drawn pursuant to a payment plan that he, on ABC's behalf, entered into with the Department to pay the liability determined during the audit of ABC's business during the earlier tax period. Tr. pp. 57-59 (Doe). Thus, Doe's argument seems to be that his payment of some of ABC's prior tax liabilities renders him immune from personal liability for ABC's current or ongoing liabilities. Doe cites no authority for such a proposition, and I know of none.

During the period from January 1995 through September 1998, Doe had personal knowledge that the Department had previously assessed tax on ABC's sales of commemorative sports coins and medallions. He knew, during the same period, that ABC had lost its prior challenge to that assessment, and that ABC was able to arrange a pay plan with the Department to pay the taxes previously determined to have been due. As he was making payments for ABC's prior tax liabilities, ABC continued to make sales of commemorative sports coins and medallions, without charging, collecting or self-assessing ROT on the gross receipts it realized from such sales. Perhaps Doe believed that ABC would be able, once again, to defer self-assessing tax on such — and other — sales, and thereafter, enter into a pay plan with the Department, should the Department

discover that ABC was incurring the same type of deficiencies as it had previously incurred. But Doe cannot claim that he did not willfully fail to file accurate Illinois sales and use tax returns, or that he did not willfully fail to pay ABC's real Illinois sales and use tax liabilities.

Conclusion:

Doe acted willfully by failing accurately to report and failing to pay ABC's Illinois sales and use tax obligations. He also acted willfully by preferring other creditors at times when he knew that ABC would not be paying its ongoing Illinois tax liabilities. I recommend, therefore, that the Director finalize NPL No. 0000 as issued, with interest to accrue pursuant to statute.

Date: 12/30/2003

John E. White
Administrative Law Judge